

1
2
3
4
5
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

6 STATE OF WASHINGTON,

7 Plaintiff,

8 v.

9 BETSY DeVOS, in her official capacity as
10 Secretary of the United States Department of
11 Education; and the UNITED STATES
12 DEPARTMENT OF EDUCATION, a federal
13 agency,

14 Defendants.

15 NO. 2:20-cv-01119-MLP

16 DECLARATION OF
17 JOLYNN BERGE IN SUPPORT OF
18 MOTION FOR PRELIMINARY
19 INJUNCTION

20 I, JOLYNN BERGE, hereby declare as follows:

21 1. I am over the age of 18, competent to testify as to the matters herein, and make
22 this declaration based on my personal knowledge. I am currently employed as the Chief Financial
23 Officer of Seattle School District No. 1 (Seattle Public Schools).

24 2. I submit this declaration in support of the State of Washington's litigation against
25 the United States Department of Education (Department) challenging the interim final rule it
26 issued that requires Local Educational Agencies (LEA) to use one of two formulas to allocate
Elementary and Secondary School Emergency Relief (ESSER) Funds provided by the CARES
Act. I have compiled the information in the statements below through my personal knowledge
or based on the documents that I have reviewed. I have familiarized myself with the information
contained in the CARES Act sections regarding primary and secondary education as well as with

1 the Department's interim final rule. I am also familiar with the requirements of section 1117 of
 2 the Elementary and Secondary Education Act (ESEA).

3 3. I have served as the Chief Financial Officer at Seattle Public Schools since June
 4 2016. Prior to my current position, I served as the Chief Financial Officer of the Washington
 5 State Office of Superintendent of Public Instruction.

6 4. As the Chief Financial Officer of Seattle Public Schools, I am responsible for a
 7 \$1 billion annual budget; oversight of all federal, state and local grants and tax levies; and
 8 oversight of all accounting, payroll, purchasing, risk management, contracting and information
 9 technology functions in the school district.

10 5. Seattle Public Schools has 104 elementary and secondary schools, with 54,798
 11 students enrolled in the 2019-2020 school year. Of those schools, 34 participate in Title I-A. 44
 12 schools in our district are eligible to participate in Title I-A, but have chosen not to.

13 6. In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic
 14 Security Act (the CARES Act) that provided funding to the States to assist with the costs
 15 associated with disruptions in education due to COVID-19. Each State is required to allocate not
 16 less than 90 percent of those funds as subgrants to LEAs. In turn, the CARES Act requires the
 17 LEAs to provide equitable services "in the same manner as provided under section 1117 of the
 18 ESEA of 1965 to students and teachers in non-public schools." Section 18003(d) of the CARES
 19 Act enumerates eligible uses of the funds provided to LEAs.

20 7. My colleagues and I were initially relieved when Congress allocated money for
 21 LEAs to support students, families, and teachers impacted by COVID-19 and the related
 22 disruptions. A significant percentage (30.35%) of students in our district come from low-income
 23 families that rely on services provided by our schools, including but not limited to:

- 24 a. Free and reduced-price meals;
- 25 b. Physical and mental health services; and
- 26 c. Supplemental after-school programs.

1 8. Others are facing added challenges of remote learning provided online. Parents
 2 and families have expressed difficulty with the responsibility of homeschooling their children
 3 while managing their own jobs during the pandemic, and have expressed that they have had
 4 difficulties in obtaining access to technology devices and internet services. Teachers have also
 5 reported pedagogical challenges associated with remote learning.

6 9. The cost to Seattle Public Schools of providing services has increased as a
 7 consequence of the COVID-19 pandemic. For example, food and technology expenses have
 8 dramatically increased; and new expenses, including personal protective devices and sanitation
 9 devices and supplies, now must be factored into budgets. Other costs include mailing
 10 instructional materials, and additional costs for cleaning and facility costs related to
 11 reconfiguration of school space to meet social distancing requirements.

12 10. Our district anticipates receiving \$10,710,000. As of August 31, 2020, we expect
 13 to spend \$9,546,668 on the following services:

- 14 a. Providing online support and a technology helpline for students as they
 15 learn to use new technology for distance learning;
- 16 b. Hiring new staff to lead and support the transition to distance learning;
- 17 c. Delivering breakfast and lunch five days a week to students who qualify
 18 for free and reduced meals;
- 19 d. Developing trainings for students, staff and parents on how to use
 20 technology platforms and best practices for distance learning;
- 21 e. Providing wireless internet access to students who do not have internet
 22 connectivity at home;
- 23 f. Covering extra staffing costs;
- 24 g. Purchasing sanitizing and cleaning supplies;
- 25 h. Investing in new technology to enable and improve distance-learning; and

1 i. Providing distance-learning related professional development services for
 2 faculty and staff.

3 11. On June 25, 2020, the Department released an interim final rule (IFR) concerning
 4 ESSER Funds. The IFR was published in the Federal Register and became effective on
 5 July 1, 2020. The IFR requires LEAs to use one of two formulas to allocate ESSER Funds
 6 between public and private institutions. The first formula—the “enrollment-based
 7 formula”—requires the district to calculate the proportional share for private schools by
 8 comparing the total enrollment of participating private schools to the total enrollment in both
 9 public and private schools. The second formula—the “poverty-based formula”—permits LEAs
 10 to use the formula provided in section 1117(a)(4)(A), but requires the schools to only administer
 11 the funds to students participating under Title I, Part A of the ESEA.

12 12. However, these formulas are inconsistent with the mandate of the CARES Act
 13 and the formula Seattle Public Schools typically uses under section 1117(a)(4)(A).

14 13. Under the formula required by section 1117(a)(4)(A) of the ESEA, private
 15 schools would be entitled to 3.40% which amounts to \$336,108 worth of services from our
 16 LEA’s subgrant. The remaining \$9,549,436 would be eligible for allocation to all public schools
 17 in Seattle Public Schools, whether or not they previously received Title I funding.

18 14. In contrast, both available formulas under the IFR impair our district’s ability to
 19 allocate ESSER Funds to students, teachers, and families in our district who are most in need of
 20 additional support.

21 a. If Seattle Public Schools opts to use the Department’s poverty-based
 22 formula, it must deny CARES Act ESSER Funds to all schools that did not participate in
 23 Title I programs for the previous year. This excludes 73 schools and 42,635 students
 24 from relief authorized by Congress under the CARES Act, thus harming their students,
 25 families, and teachers. In our district, 10 schools are eligible to receive Title I funding

1 but opt not to do so. Consequently, 3,788 low-income students—who are most in need
 2 of relief—will be excluded from funding under this formula.

3 b. If Seattle Public Schools opts to use the Department’s enrollment-based
 4 formula, private schools would receive 19.13%. This is a \$1,554,995 increase in funds
 5 to private schools, some of which have large endowments and are able to shoulder the
 6 increased costs of the pandemic, at the direct expense of the district’s public schools.
 7 Any diminishment in the ESSER Funds that go to our public schools will reduce the
 8 services that our district is able to provide to our students, families, and teachers who are
 9 most in need of relief.

10 15. Any diminishment in funds harms the ability of Seattle Public Schools to
 11 accomplish its commitment to ensuring equitable access, closing the opportunity gaps,
 12 and excellence in education for every student. Public schools already face significant budgetary
 13 constraints. At the same time that Seattle Public Schools is facing increased costs due to the
 14 pandemic (including health and safety expenses that are expected to exceed \$15 million in the
 15 2020-2021 school year), it is facing the prospect of funding reductions due to a shortfall in the
 16 Washington State budget of over \$8 billion. The Department’s restrictions come at a time when
 17 resource-strapped institutions are scrambling to prepare for the coming school year while
 18 continuing to support needy students who are disproportionately impacted by the disruptions
 19 caused by COVID-19.

20 16. In addition, by breaking from the traditional approach governed by section
 21 1117(a)(4)(A) of the ESEA and introducing novel formulas, the rule is pulling additional
 22 resources from within the school district to accommodate and administer this new approach. The
 23 administrative burden of adopting a new formula to allocate the funds comes at a time when
 24 districts are already unstaffed and overworked, adding yet another obstacle for school districts
 25 attempting to create an effective and equitable learning environment for students in the midst of
 26 the pandemic. Seattle Public Schools staff have had to work additional time in order to complete

1 the requirements associated with the funding and to establish multiple funding scenarios based
 2 on the difference in guidance from federal and state agencies.

3 17. Additionally, the Department's requirement that consultation with private
 4 schools occur prior to any expenditure of funds imposes an administrative burden that impairs
 5 the district's ability to administer the emergency relief funds in a timely fashion. The CARES
 6 Act was passed in March, yet the Department imposes this novel requirement with the IFR it
 7 released in late June. This leaves our district in a state of uncertainty about the lawfulness of
 8 expenditures incurred prior to the Department's IFR.

9 18. Seattle Public Schools runs the risk of an enforcement action by the Department
 10 if ESSER Funds are not allocated according to one of the two formulas. Because of significant
 11 budgetary restraints, the district would not be able to retroactively pay private schools a greater
 12 share of the ESSER Funds than originally allocated under the formula required under section
 13 1117(a)(4)(A).

14 19. If the Department is not immediately enjoined from enforcing the IFR, Seattle
 15 Public Schools faces severe consequences. Educators and administrators are already racing
 16 against the clock to prepare for the start of the 2020–21 school year and address the
 17 technological, structural, and pedagogical challenges that face them. Any delay in funding
 18 impedes Seattle Public Schools' ability to plan and coordinate critical expenditures for students
 19 and teachers, leaving Seattle Public Schools in a state of uncertainty regarding the amount of
 20 funding available for critical programs like free and reduced-price meals, access to internet
 21 connectivity, and PPE for students and teachers. These programs are essential to low-income
 22 students who are already severely impacted by the pandemic and critical to closing opportunity
 23 gaps in educational achievement that have the potential to widen during this unparalleled time.
 24 Further, because of the IFR, Seattle Public Schools already faces significant administrative costs
 25 at a time when districts are already dealing with substantial resource constraints. Modifying
 26 existing plans to accommodate the unanticipated provisions of the Department's rule diverts time

1 and staff resources that are already in short supply. At this crucial moment of preparation for the
2 upcoming academic year under unprecedeted conditions, any reduction, withholding, or delay
3 in emergency funding harms both the State and its most vulnerable students. In sum, The IFR
4 already harms the district, its teachers, and its students.

5 I declare under penalty of perjury under the laws of the State of Washington and the
6 United States that the foregoing is true and correct.

7 DATED this 22nd day of July 2020, at Seattle, Washington.

8
9 *JoLynn Berge*
10 JOLYNN BERGE
Chief Financial Officer
Seattle Public Schools
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26